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No. 10-618 (5)

Supreme Court, U.S.
FILED
FEB 8 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF NEW YORK, et al.,

Petitioners,

v.

METROPOLITAN TAXICAB
BOARD OF TRADE, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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February 8, 2011

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REPLY ARGUMENT

Introduction

Respondents ignore Petitioners' central point: this Court should grant *certiorari* to confirm that when Congress enacted the Energy Policy and Conservation Act ("EPCA") as the only statutory mechanism for establishing fuel economy standards, it did not intend to preempt state and local governments from adopting incentive programs to promote the purchase of fuel-efficient vehicles.

Instead of responding to Petitioners' arguments for granting *certiorari*, and instead of addressing the decision of the Court of Appeals, Respondents oppose the grant of *certiorari* essentially by defending the decision of the District Court. The crux of Respondents' argument in opposition to Petitioners' request for *certiorari* is that because the District Court determined that the challenged regulations[1] are a *de facto* mandate to purchase hybrid vehicles, and because Petitioners did not appeal from an earlier District Court decision determining that prior regulations mandating the purchase of vehicles achieving specified mile-per-gallon standards[2] are preempted by EPCA (electing instead to re-draft their rules in an effort to address the concerns of the court), the Court of Appeals properly affirmed the District Court's determination that the challenged regulations are likely preempted by EPCA as well.

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1. 35 Rules of the City of New York ("RCNY") § 1-78(a)(3) ("Lease Cap Rules").

2. *See* 35 RCNY § 3.03(c)(10)-(11) (repealed 2009) ("25/30 MPG Rules").

The Court of Appeals decided the case, however, under an entirely different framework of analysis than that employed by the District Court. In the District Court, both the parties and the Court assumed that the Lease Cap Rules do not directly reference fuel economy standards or incorporate those standards into the Lease Cap Rules' operation. *See Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009) (*MTBOT II*). Accordingly, the District Court addressed whether the Rules effectively mandate the use of fuel-efficient vehicles through their economic impact, and concluded that they do. *Id.* Petitioners contested, not conceded, this conclusion of the District Court.[3]

On appeal, Petitioners argued that the Lease Cap Rules do not constitute a preempted mandate and Respondents argued that they do. The Court of Appeals rejected the District Court's framework of analysis outright, finding that "[t]his attention to economic impact was misguided." App. 12a. Thus, the Court of Appeals affirmed the injunction on grounds not argued or decided below, i.e., "because the rules in question directly regulate the relevant preempted subject matter." App. 12a. Because Respondents' arguments fail to endorse the reasoning in the decision of the Court of Appeals, their arguments contribute nothing to this Court's consideration of whether to grant *certiorari* review.

This Court should grant *certiorari* to reverse the Court of Appeals' judgment, which rests upon an erroneous

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3. The suggestion that Petitioners have "conceded" that the Lease Cap Rules constitute a preempted mandate and that the Court of Appeals left this finding "undisturbed" are blatant misrepresentations of the procedural and factual background of this case. *See* Brief in Opposition, at 3, 32.

application of this Court's preemption jurisprudence, conflicts with the analysis of "related to" preemption language applied by other Courts of Appeals, and results in the improper displacement of state law.

A. This Court Is Being Asked to Review the Decision of the Court of Appeals, Not the Decision of the District Court.

Respondents' attempt to shift the focus from the decision of the Court of Appeals to the District Court decision that it superseded is understandable, as the Court of Appeals' decision cannot be squared with this Court's precedents governing the scope of the preemptive language at issue. By reading the "related to" language in EPCA's preemption clause over-broadly, the Court of Appeals ignored this Court's instructions and arrived at an erroneous result. *See* Petition for a Writ of *Certiorari* ("Pet.") at 13-14.

EPCA does not preempt every law that relates to fuel economy; it preempts laws that are related to "fuel economy standards or average fuel economy standards." 49 U.S.C. § 32919(a). *See* Pet. at 12-13. The Lease Cap Rules do not directly regulate fuel economy standards, but rather, taxicab lease rates, a field traditionally occupied by local government.[4] Nor do the Rules contain

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4. Because, as Respondents concede, the regulation of taxicab services is a traditionally local matter, the Court of Appeals' analysis of the scope of EPCA preemption should have begun with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. *See Altria Group, Inc. v. Good*, 555 U.S. 70, 129 S. Ct. 538, 543 (2008) ("When addressing questions of express or implied pre-emption, we begin our analysis with the

an impermissible reference to fuel economy standards, as the existence of federal fuel economy standards is not essential to their operation. *See Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997). The Court of Appeals reached its contrary conclusion by reading the word "standard" out of EPCA's preemption clause. *See* Brief of City of Chicago, et al., as *Amici Curiae* in Support of Petitioners ("Chicago Brief") at pp. 13-17 (Court of Appeals both misidentified the preempted subject matter and mischaracterized the Lease Cap Rules). Because, under the reasoning of the Court of Appeals, any regulation of taxicab size, shape, weight, engine technology, or equipment will inevitably have some impact on fleet fuel economy, *see* Brief for the United States as *Amicus Curiae* at 12, *MTBOT II* (No. 09-2901) ("U.S. *Amicus* Brief"), any taxicab regulation affecting a taxicab owner's choice of vehicles would be preempted by EPCA.

Rather than defending the analysis that led the Court of Appeals to its overly broad application of "related to," Respondents contend that the Lease Cap Rules are preempted on the alternative theory that they are "identical in purpose and effect" to the City's preempted MPG regulations and thus, the Court of Appeals did not have to conduct a fresh analysis of the Lease Cap Rules in

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assumption that the historic police powers of the States are not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."); Pet. at 11-13; Brief for the United States as *Amicus Curiae* at 11, *MTBOT II* (No. 09-2901) ("Neither before or since the enactment of EPCA has Congress sought to bring the taxicab industry under federal regulatory control").

order to find preemption.[5] *See* Brief in Opposition ("Opp.") at 21. This argument suffers from two fatal flaws. First, the Court of Appeals did not rely on an examination of either the purpose or effect of the Rules, let alone find that the two sets of rules were "identical." Respondents thus defend the District Court's decision while misstating the grounds for the Court of Appeals' decision. Second, the obvious differences between the two sets of rules demonstrate the fallacy of this point. The 25/30 MPG Rules had the purpose of requiring that 100 percent of new taxicabs across the industry (with the exception of handicap-accessible taxis) meet a mandatory performance standard. The Lease Cap Rules, by contrast, only apply to fleet owners, who comprise roughly 30 percent of the industry.[6] The explicit intent of the Lease Cap Rules, as recognized by the Court of Appeals, is to effectively shift fuel costs from fleet drivers to fleet owners, exposing

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5. Citing to a 1939 voting rights case, Respondents also argue that the Lease Cap Rules are invalid as a "circumvention" of the federal court's invalidation of the 25/30 MPG Rules. Opp. at 4, 21 (citing *Lane v. Wilson*, 307 U.S. 268 (1939)). Respondents' argument urges the absurd result that government agencies be foreclosed from pursuing legitimate objectives whenever earlier regulations of the subject matter have been found invalid. Yet, this Court has recognized that even a regulation that acts upon a preempted subject matter may be permissible. *See Dillingham*, 519 U.S. at 334; *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 658-59 (1995) (recognizing distinction between state laws that act as incentives and those that are actual or *de facto* mandates).

6. Thus, even if the Lease Cap Rules were found to create a *de facto* mandate, they are not likely to have a significant impact on the overall federal regulation of the average fuel economy of automobile manufacturers. *See* U.S. *Amicus* Brief at 14.

fleet owners (the vehicle purchasers) to roughly the same economic pressures (cost of fuel per shift) faced by owners who drive their own taxis. App. 2a, 5a. Thus the purpose of the Lease Cap Rules is to incentivize fleet owners' purchase of hybrid vehicles at rates consistent with the rest of the industry. *See* Joint Appendix ("JA") 502-503.[7]

Ultimately, because the Lease Cap Rules contain no reference to or essential incorporation of fuel economy standards, the Court of Appeals was required to examine whether the Rules mandate, or effectively mandate, something within the area that Congress intended to control. This is the approach that this Court took in *Dillingham*, 519 U.S. at 334, and *Travelers*, 514 U.S. at 658-59, both of which recognize the distinction between state laws that act as incentives and those that are actual or *de facto* mandates. Other Courts of Appeals have applied this approach in other preemption cases. *See Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007); *Associated Builders & Contractors v. Mich. Dep't of Labor & Econ. Growth*, 543 F.3d 275 (6th Cir. 2008); *Golden Gate Rest. Ass'n v. City & County of San Francisco*, 546 F.3d 639 (9th Cir. 2008). Thus, unlike the "reference to" prong, where the magnitude of the statute's effect is not an issue, under the "connection with" prong, the court must measure the challenged law's supposed effect upon the preempted subject matter to determine whether the effect is sufficiently disruptive to merit preemption. *See Travelers*, 514 U.S. at 659-60.

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7. In 2009, hybrid and clean diesel vehicles accounted for roughly 40 percent of new taxicab purchases by owner-drivers while accounting for only 28 percent of purchases by fleet owners. JA509.

Here, the Court of Appeals erroneously departed from the analysis of its sister circuits in failing to examine whether the Lease Cap Rules' indirect effect on fuel economy constitutes a preempted mandate. *See* Pet. at 18-19. Congress's intent was not to foreclose every state action with an effect on fuel economy, but rather to maintain exclusive federal control over the regulation of manufacturers' mandatory fuel economy standards. *See* 49 U.S.C. §§ 32901(a)(6), 32919(a). Where the Lease Cap Rules do not control or supersede EPCA's central function of regulating the corporate average fuel economy standards applicable to manufacturers of automobiles, they do not have the connection to fuel economy standards forbidden by EPCA.

B. This Case Presents an Urgent Question of National Importance Requiring Immediate Review.

While Respondents attempt to reassure this Court that the Court of Appeals' ruling is narrow and will not place other incentive programs at risk, they fail to address the fact that the overly broad language of the ruling below has already had a chilling effect on other local governments' efforts to promote fuel-efficient taxicabs. As noted by municipal *amici*, both Minneapolis and Seattle have already curtailed their experimentation with fuel-efficient taxicab regulations in direct response to the ruling in this case. Chicago Brief at pp. 28-29. Thirteen additional cities, the United States Conference of Mayors, the National League of Cities, and the International Municipal Lawyers Association all joined with Chicago to argue that the Court of Appeals' ruling will impede their efforts to implement forward-thinking incentive programs.

Moreover, Respondents' argument that this Court should not concern itself with the Court of Appeals' error, because future courts will distinguish Petitioners' case on the facts, is purely speculative. Of the decisions cited by Respondents, only *Association of Taxicab Owners, USA v. City of Dallas* was issued recently enough to cite the Court of Appeals' ruling, and that case did not involve EPCA. *See Ass'n of Taxicab Operators, USA v. City of Dallas*, No. 3:10-CV-769-K, 2010 U.S. Dist. LEXIS 140240 (N. Dist. Tex. Aug. 30, 2010) (front-of-the-line privileges awarded to compressed natural gas taxicabs at Dallas Love Field airport challenged as preempted by the Clean Air Act).[8] The Court of Appeals' ruling informs other courts that they need no longer concern themselves with finding the line between true incentives and *de facto* mandates.[9] Respondents' assurances that courts in other circuits will apply their own definition of "related to" misses the critical point that, in cases challenging hybrid vehicle incentives, these courts will look to the Second Circuit's EPCA-specific interpretation of "related to"

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8. The Boston and Seattle cases cited by Respondents were decided before the Court of Appeals' ruling, and thus cited the decision of the District Court, not of the Court of Appeals, for the distinction between an incentive and a *de facto* mandate. *See Ophir v. City of Boston*, 647 F. Supp. 2d 86 (D. Mass. 2009), *Green Alliance Taxi Cab Ass'n v. King County*, No. C08-1048RAJ, 2010 U.S. Dist. LEXIS 72409 (W.D. Wash. June 29, 2010).

9. Respondents posit four categories of incentives that would be safe from preemption challenges, but fail to apply these categories to any of the numerous state and local incentives cited in the Petition. Opp. at 36. None of the cited incentives fall within category (1) (own use) or (4) (market participant). Categories (2) and (3) are Clean Air Act provisions of limited applicability to the EPCA-based preemption challenges addressed here.

before considering what that phrase has meant in ERISA cases. The Court of Appeals' ruling both diverges from existing preemption jurisprudence and sets a uniquely bad precedent for future EPCA cases.

The Court of Appeals' ruling is already working its mischief, and this Court should act swiftly to correct it. Each incentive program that is stifled before it can be implemented will decrease the likelihood that other courts will be presented with this issue at all. The interlocutory nature of this appeal should not prevent the Court from taking this opportunity to address the proper scope of preemption under EPCA. The factual record in this case is well developed, and the Court of Appeals' decision, resting solely on the basis that Respondents had "demonstrated a likelihood, indeed a certainty, of success on the merits" of their preemption claim, presents this Court with a clean and clearly decided issue worthy of review. App. 12a.

This Court should not heed Respondents' attempts to distort or obscure the question presented. Respondents' decision not to challenge the $3 upward adjustment of the lease cap at the preliminary injunction stage (they do challenge it on the merits), does not mean that this case is not about incentives. *See* Opp. at 30; *see also* App. 5a (Court of Appeals noting that "[f]or obvious reasons, the [Respondents] did not challenge the $3 upward adjustment of the lease caps for hybrid taxis, which benefitted them"). To the contrary, this case squarely presents the question whether the City's clean-vehicle incentive program creates a preempted mandate. Both the $3 upward adjustment and $12 downward adjustment provide financial incentives for fleet owners to change their economic behavior. Neither the Court of Appeals nor the District Court drew any

legal distinction between the upward and downward adjustments.[10] The Court of Appeals' determination that the incentive/mandate analysis is irrelevant does not mean that its decision excludes incentives. On the contrary, it is dangerously overbroad precisely because it erases this critical distinction and sweeps both incentives and mandates within its reach.

Finally, Respondents are wrong in repeatedly asserting that the Petition presents a hypothetical case to this Court. *See* Opp. at 3, 15, 20, 24, 32. The Lease Cap Rules have been invalidated by the Court of Appeals on a preemption theory that does not square with precedents of this Court, or with how other Courts of Appeals have understood those precedents. The Court should reverse and remand, and the Court of Appeals should be required to decide this case in accord with this Court's precedents. Whether Petitioners will ultimately prevail under the proper application of preemption law is irrelevant to this Court's determination whether to grant this writ. This case raises an issue of considerable and immediate importance, because few if any incentive programs designed to encourage fuel-efficient vehicle use will be able to escape the breadth of the Court of Appeals' interpretation of preemption under EPCA.

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10. Indeed, the entire purpose of the District Court's evidentiary hearing, properly required under *Travelers*, was to determine whether the downward adjustment was permissible as an incentive or preempted as a *de facto* mandate. App. 34a-35a.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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